SUPREME COURT, U. S.

71-34

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

POP POPPENHEIMER, Individually, and as the Legally Elected Representative of Memphis and Shelby County Citizens, Residents, and Taxpayers,

PLAINTIFFS-PETITIONERS

VS

THE STATE OF TENNESSEE, acting through its agents and arms,
THE CITY OF MEMPHIS, TENNESSEE,
THE COUNTY OF SHELBY, TENNESSEE,
ET AL

DEFENDANTS-RESPONDENTS

RESPONDENTS' CITY OF MEMPHIS AND BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This brief is respectfully filed in behalf of the Defendants, Respondents, City of Memphis, and the Board of Education of the Memphis City Schools in

opposition to the petition for writ of certiorari filed herein.

BASIC ISSUE

The basic issue presented by the Petition is whether the United States Court of Appeals for the Sixth Circuit was correct in affirming the ruling of the District Court that the Complaint of the Plaintiffs-Petitioners fails to state a claim on which relief can be granted. (For Convenience the parties will be referred to in accordance with their status in the trial court, that is Petitioners as "Plaintiffs" and Respondents City of Memphis and Board of Education of the Memphis City Schools as "Defendants".)

II.

STATEMENT OF THE CASE

Defendants cannot accept the statement of facts of plaintiffs.

A. Concise Summary of The Controversy

The instant case involves a suit brought against these defendants, together with the State of Tennessee, the County of Shelby, and the School Board of Shelby County, The Complaint seeks to invali-

date both the electoral districts and the general electoral framework of each of the defendants. The Complaint also attacks two laws regarding the general voting procedures in the State of Tennessee.

The District Court for the Western District of Tennessee granted a motion of these defendants to dismiss the Complaint for failure to state a claim on which relief can be granted, and the Sixth Circuit Court of Appeals affirmed that dismissal for the reasons stated by the District Judge. (Petition for Certiorari Page 37).

B. **The Facts**

Defendant, The City of Memphis, is a municipal corporation existing under the laws of the State of Tennessee. It is operated by a Mayor and Council form of government. The Mayor, together with six members of the Council, is elected from the City at large, while the remaining seven Council members are elected by unitary single-member districts. A Charter amendment adopted on August 6, 1970, provided for the election of a temporary councilman from newly annexed territory so that until the next city election in October of 1971, there are eight districts; after which the City will revert to seven districts. As indicated the next election for City offices is scheduled to be held on October 7, 1971.

Prior to that election, the Council is required, pursuant to Section 3 of the Charter of the City of Memphis, to redraw the boundaries of the seven districts so that the districts reflect any population changes shown in the 1970 census. Section 3 of the Charter of the City of Memphis is as follows:

> **"Re-Districting After Decennial Census.** BE IT FURTHER ORDAINED, that notwithstanding that provisions of the preceding Section of this Ordinance, a review and adjustment of the boundaries of said districts as originally established, or as thereafter changed, shall be completed not less than ninety (90) days prior to the next Municipal Election following the publication of the official decennial federal census and shall be as equal in population as practicable."

The Council acted pursuant to this law as evidenced by an ordinance passed on June 22, 1971, as set forth in the appendix.

The Defendant, Board of Education of the Memphis City Schools, is a separately-chartered governmental agency existing under the Private Acts of the State of Tennessee and charged with the responsibility of operating the public school system of the City of Memphis. The jurisdiction of the Board of

Education is co-extensive with the boundaries of the City of Memphis. The present Board of Education was elected in 1967 and consists of five members elected from the City at large. The terms of the incumbent school commissioners will last until January 1, 1972. Pursuant to Chapter 340, Private Acts of 1970, the next election of school commissioners will be held on the first Thursday following the first Tuesday in October, 1971, to conform with the elections of the City of Memphis. The same Act provides that at this election, two school commissioners will be elected from the City at large and seven school commissioners will be elected by district. The districts will be identical with the electoral districts of the seven district councilmen elected for the City of Memphis. It should be noted that Section 3, Chapter 340, Private Acts of 1970, also provides for the incorporation in the district boundaries of any amendments made by the council of the City of Memphis. Thus, the revision of the district boundaries to reflect the result of the 1970 census will automatically result in a revision of legislative boundaries from which the school commissioners are to be elected.

C. History of Litigation

The instant lawsuit purports to be brought under the Civil Rights Act and constitutes an attack

on the electoral structure of the various defendants. The lawsuit also includes allegations of unconstitutionality directed against Tennessee Code Annotated 2—1507 to the extent that this section prohibits the use of numbers of designate candidates on the ballot, and T.C.A. 2—1502 to the extent that this section sets a two minutes limit on the time which any one voter shall be allowed to occupy a voting machine. On May 6, 1970, following certain amendments to the Complaint, the District Court entered an order denying the plaintiffs' request for a three-judge District Court. An appeal from this order was dismissed by this Court on October 19, 1970 and an order denying a three judge court was entered by the Sixth Circuit on November 3, 1970. Defendants are uncertain from plaintiff's brief whether this denial of a three-judge District Court is regarded by plaintiff's as an issue on appeal. Defendants would point out, however, that this ruling was obviously correct with respect to the issues involving these defendants since it is conceded that the attack on the electoral structure of the City of Memphis and of the Board of Education of the Memphis City Schools in no way involves a State law of general application.

After denial of the request for a three-judge District Court, all defendants filed motions to dismiss

the Complaint on the grounds that the Complaint failed to state a cause of action upon which relief could be granted. A counter motion for summary judgment was filed by the plaintiffs. By order dated July 14, 1970, the District Court granted the motions of the defendants and dismissed the Complaint. (Petition for Certiorari p. 38). With respect to these defendants, this action was based on the Court's conclusions that, because of the forthcoming reapportionment of the City Council districts, the Complaint attacked an apportionment which would cease to be operative before the 1971 election. The Court further ruled that the other contentions of the plaintiffs were without merit. The Sixth Circuit Court of Appeals affirmed the action of the District Court for the reasons cited by Judge Brown (Petition for Certiorari, page 37).

ARGUMENT

A. Imbalance of Population Existing Among the Present City Council Districts will be Remedied Prior to the 1971 Elections.

The Complaint filed in this cause devotes most of its allegations to an attack on the apportionment by population of the existing district zone lines of these defendants. In support of its motion to dis-

miss, the defendant City of Memphis, and the defendant Board of Education of the Memphis City Schools showed that, in accord with Section 3 of the Charter of the City of Memphis, these zone lines would be redrawn in light of the 1970 Federal Census so that changes in population which would have taken place since the initial drawing of these zones would be taken into account and so that the zones would be as equal in population as possible. The applicable section of the Charter of the City of Memphis is as follows:

> "Section 3. **Re-Districting After Decennial Census.** BE IT FURTHER ORDAINED, That notwithstanding the provisions of the preceding Section of this Ordinance, a review and adjustment of the boundaries of said districts as originally established, or as thereafter changed, shall be completed not less than ninety (90) days prior to the next Municipal Election following the publication of the official decennial federal census and shall be as equal in population as practical."

As previously noted the Council so acted as evidenced by the ordinance dated June 22, set forth in the appendix.

As noted previously, the Private Acts constituting the Charter of the Board of Education of the Memphis City Schools, and particularly, Section 3 of Chapter 340 of the Private Acts of 1970 will incorporate by reference the zone lines of the City of Memphis and will automaically adopt any changes which are made to confirm to those zone lines to the 1970 census:

> "Section 3. Each of the seven (7) districts for the election of members of the Board of Education of the Memphis City Schools shall be the same districts as provided in the Charter of the City of Memphis, as from time to time amended, for councilmen of the City of Memphis as such districts exist on the final qualifications date for submission of nominating petitions to the Shelby County Election Commission prior to the municipal election in which such members of the said Board are elected."

The record before the District Court and the Court of Appeals also included an affidavit of the Chairman of the City Council of the City of Memphis indicating that the Council recognized and would perform its duty of reapportionment pursuant to Section 3 of the City Charter.

In attempting to attack the previously existing zone lines, therefore, the Plaintiffs, are in essence attempting to litigate a point which is moot. More important, they are attacking a system of periodic reapportionment which was specifically endorsed by the United States Supreme Court in the case of **Reynolds v Sims**, 377 U.S. 533, 12 L. Ed 2d 506. In that case it was expressly held that reapportionment of legislative districts following each Federal decennial census complied with Constitutional requirements:

> "While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such approach would clearly meet minimal requirements for maintaining a reasonably current scheme of legislalative representation." 377 U.S. at 583-4; 12 L. ed. 2d at 540.

These defendants can imagine no more unproductive waste of Court time than to be involved in a lengthy litigation of the City Council districts, where it is clear that these districts have been superseded by new districts prior to the election scheduled for October, 1971. With respect to the Board of Education of the Memphis City Schools, any issues relating to existing district lines set forth in

the complaint are even more irrelevant, since the Board of Education is presently elected at large and had no relationship to any district lines until after the required redrawing of the districts.

B. The Complaint Fails to Support its Allegations of Gerrymandered Districts.

In the section of the Complaint relating to "line gerrymander" the plaintiffs purport to attack the drawing of the specific lines of the legislative districts. They fail to allege, however, either that the district lines are unreasonably drawn or that they have been consciously drawn for the purpose of producing some invidious result. On the contrary, the Complaint alleges only that the City has engaged, "designedly" or not," in line gerrymandering. Defendants submit that an allegation of conscious misdrawing of zone lines to achieve some unconstitutional purpose is of the essence of a "gerrymander". See, for example, the definition of "gerrymander" given in **Black's Law Dictionary:**

> "GERRYMANDER. A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish a sinister or unlawful purpose. . ."

It is to be noted that the Complaint alleges no purpose "sinister" or otherwise, which is to be effected by the so-called gerrymander. It also fails to allege that the districts of the City of Memphis are, in fact, drawn according to any standard other than normal political boundaries. In fact, the only allegation made in support of the Complaint's assertion of "line Gerrymander" is the Complaint's statement that two of the seven districts contain a majority of Negro voters. Defendants submit that this hardly constitutes an allegation on which a finding of "gerrymander" could be based.

In Connection with the Complaint's statement with regard to racial majorities in the City's electoral districts, it is interesting to note that Section E of the Complaint's prayers for relief does not request the drawing of racially-balanced districts but, rather, prays that these defendants be ordered to reconstruct the district boundaries as to recognize "relatively homogeneous communities such as Frayser and northeastern Shelby County, Whitehaven, Parkway Village and Fox Meadows, Orange Mound, North Memphis - Klondyke - Hollywood, Southwest Memphis and Levi, West Central Memphis, Highland Heights-Berclair, East Memphis, and other communities of such nature. . ." Each of the Communities mentioned in this prayer is readily identi-

fiable as predominant of one race or the other. It would appear that the Complaint, after unsuccessfully attempting to allege that the present electoral boundaries are gerrymandered by race, is asking the Court to require that the electoral districts of these defendants be drawn entirely along racial lines.

C. The Remaining Allegations Involve Complaints which are outside the Scope of Federal Constitutional Rights and which DO Not Involve Matters of which the Federal Courts Would Take Cognizance.

In addition to the Complaint's allegation respecting "registered voter gerrymandering" and "line gerrymandering", the Complaint embarks on the discussion of a number of matters which are entirely beyond the scope of cases dealing with either Constitutional protection against gerrymandering districts or the constitutional requirements of the one man—one vote doctrine. In these portions of the Complaint, the plaintiffs appear to object to the number of electoral districts instituted by the Memphis City Charter and by the Private Acts chartering the Board of Education of the Memphis City Schools. Defendants submit that Federal cases dealing with legislative apportionment and with all

other forms of electoral bodies have invariably respected the determination of State and local governments as to the proper size of each legislative body and that the number of City councilmen and school commissioners elected is not a matter which is cognizable by the Federal Courts.

Further, plaintiffs appear to rely on the statement in **Dusch v Davis,** 387 U. S. 112, at 117, as a prohibition against "oversize districts". In the context of that case, however, the word "oversize" refers to the fact that the district was not properly balanced with regard to population. It has nothing whatever to do with plaintiffs' contention that the Federal Courts should supervise the number of districts of which a given legislative body is to be composed.

The plaintiffs also appear to object to the fact that some City Councilmen and School Commissioners are to be elected from the City at large as a supplement to the election of Councilmen and Commissioners by district. In making this contention, the plaintiffs again stray outside the scope of issues which are cognizable by the Federal Courts. In. **Reynolds v Sims,** supra it was observed that "single member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member of floterial dis-

tricts." (377 U.S. at 579; 12 L. Ed. 2d at 537). The rule thus stated applies even more forcefully to the circumstances in the instant case where there will be no situation in which different voters would vote for different numbers of representatives. Unlike the situation which may prevail in State Legislative districts, the plan for both of these defendants will require that each voter votes for the identical number of representatives; that is, each voter will have the opportunity to case a vote for one district City Councilman and six at-large Councilmen and for one district School Commissioner and two at-large School Commissioners. Thus, the revision of the legislative boundary lines to adjust the boundaries to the results of the 1970 census results in absolute adherence to the principle of "one man—one vote".

The defendants submit, therefore, that the balance of the complaints which the plaintiffs have raised with regard to the legislative apportionment of these defendants raise no Federal constitutional issues. The fact that the plaintiffs would prefer some different electoral mechanism does not create a justiciable issue. The remaining allegations of the Complaint address themselves to defendants other than the City of Memphis and the Board of Education of the Memphis City Schools. These defendants are not proper parties for the litigation either of

the issues involving the electoral framework of the Shelby County government or the enforcement of the State laws relating to voting procedure, inasmuch as these matters are entirely outside the jurisdiction of either of these defendants.

CONCLUSION

For the reasons above stated, the defendant, City of Memphis and the defendant, Board of Education of the Memphis City Schools, respectfully submit that the Petition for Certiorari fails to set forth any cause of action on which relief could be granted and should be denied and that the order of the Sixth Circuit Court of Appeals dismissing the Complaint affirmed.

RESPECTFULLY SUBMITTED,

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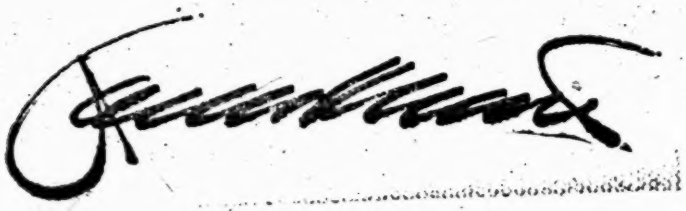
CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three copies of this Brief in Opposition to Petition for Writ of Certiorari to the Attorney for Petitioners, W. Slater Hollis, P. O. Box 80876, Memphis, Tennessee 38111, this 16th day of July, 1971.

James M. Manire



ORDINANCE

AN ORDINANCE TO AMEND SECTION ONE (1) OF THE HOME RULE CHARTER OF THE CITY OF MEMPHIS, ORDINANCE NUMBER 1852, AND ADOPTED AT AN ELECTION HELD NOVEMBER 8, 1966, AS AMENDED BY REDISTRICTING THE SEVEN (7) DISTRICTS SET FORTH IN SECTION ONE (1) OF SAID ORDINANCE AS AMENDED.

WHEREAS, Section 3 of the Home Rule Charter of the City of Memphis provides that the seven (7) Council Districts shall re re-districted after each Decennial Census.

SECTION 1: NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Section 1 of the Home Rule Charter of the City of Memphis, being Ordinance 1852 and adopted at an election November 8, 1966 as amended be further amended by striking the list of wards set forth in each of the seven (7) Districts described in Section 1 as amended, and substituting in lieu thereof new Wards assigned to Districts as follows:

DISTRICT ONE shall be and is composed of the areas encompassed by the following Wards:

Ward 42—Precinct 1
Ward 43—Precinct 1
Ward 43—Precinct 2
Ward 43—Precinct 3
Ward 43—Precinct 4
Ward 53—Precinct 1
Ward 53—Precinct 2
Ward 54—Precinct 2
Ward 62
Ward 63—Precinct 1
Ward 63—Precinct 2
Ward 69—Precinct 1
Ward 69—Precinct 2
Ward 70—Precinct 1
Ward 70—Precinct 2
Ward 71—Precinct 1
Ward 71—Precinct 2
Ward 72—Precinct 1
Ward 72—Precinct 2
Ward 72—Precinct 3

DISTRICT TWO shall be and is composed of the areas encompassed by the following Wards:

Ward 45—Precinct 3
Ward 46—Precinct 1
Ward 46—Precinct 2
Ward 46—Precinct 3

Ward 55—Precinct 1
Ward 55—Precinct 2
Ward 56—Precinct 1
Ward 56—Precinct 2
Ward 57
Ward 58—Precinct 1
Ward 58—Precinct 2
Ward 58—Precinct 3
Ward 58—Precinct 4
Ward 58—Precinct 5
Ward 64
Ward 65—Precinct 1
Ward 65—Precinct 2
Ward 66—Precinct 1
Ward 66—Precinct 2
Ward 67—Precinct 1
Ward 67—Precinct 2
Ward 67—Precinct 3
Ward 68—Precinct 1
Ward 68—Precinct 2
Ward 74—Precinct 1
Ward 80
Ward 81

DISTRICT THREE shall be and is composed of the areas encompassed by the following wards:

Ward 60—Precinct 5

Ward 73—Precinct 1
Ward 73—Precinct 2
Ward 73—Precinct 3
Ward 74—Precinct 2
Ward 74—Precinct 3
Ward 74—Precinct 4
Ward 76—Precinct 1
Ward 76—Precinct 2
Ward 76—Precinct 3
Ward 77—Precinct 1
Ward 77—Precinct 2
Ward 78—Precinct 1
Ward 78—Precinct 2
Ward 78—Precinct 3
Ward 79—Precinct 1
Ward 79—Precinct 2
Ward 79—Precinct 3

DISTRICT FOUR shall be and is composed of the areas encompassed by the following wards:

Ward 14—Precinct 2
Ward 26—Precinct 2
Ward 26—Precinct 3
Ward 29—Precinct 1
Ward 29—Precinct 2
Ward 29—Precinct 3
Ward 28—Precinct 1

Ward 28—Precinct 2
Ward 30
Ward 32
Ward 33
Ward 36—Precinct 1
Ward 36—Precinct 2
Ward 36—Precinct 3
Ward 37—Precinct 1
Ward 37—Precinct 2
Ward 38—Precinct 1
Ward 38—Precinct 2
Ward 38—Precinct 3
Ward 38—Precinct 4
Ward 40—Precinct 2
Ward 44—Precinct 1
Ward 44—Precinct 2
Ward 44—Precinct 3
Ward 44—Precinct 4
Ward 44—Precinct 5
Ward 45—Precinct 1
Ward 45—Precinct 4
Ward 52—Precinct 1
Ward 52—Precinct 2
Ward 52—Precinct 3
Ward 54—Precinct 1

DISTRICT SIX shall be and is composed of the areas encompassed by the following wards:

Ward 12
Ward 13—Precinct 1
Ward 13—Precinct 2
Ward 13—Precinct 3
Ward 24
Ward 25—Precinct 1
Ward 25—Precinct 2
Ward 25—Precinct 3
Ward 25—Precinct 4
Ward 34—Precinct 2
Ward 35—Precinct 1
Ward 35—Precinct 2
Ward 35—Precinct 3
Ward 49—Precinct 1
Ward 49—Precinct 2
Ward 50—Precinct 1
Ward 50—Precinct 2
Ward 60—Precinct 1
Ward 75—Precinct 1
Ward 75—Precinct 2
Ward 75—Precinct 3
Ward 75—Precinct 4
Ward 75—Precinct 5

DISTRICT SEVEN shall be and is composed of the areas encompassed by the following wards:

Ward 1
Ward 2

Ward 5
Ward 7
Ward 11—Precinct 1
Ward 11—Precinct 2
Ward 14—Precinct 1
Ward 18
Ward 20—Precinct 3
Ward 21—Precinct 1
Ward 21—Precinct 2
Ward 21—Precinct 3
Ward 22
Ward 23
Ward 27—Precinct 1
Ward 27—Precinct 2
Ward 39
Ward 40—Precinct 1
Ward 41—Precinct 1
Ward 41—Precinct 2
Ward 41—Precinct 3
Ward 42—Precinct 2
Ward 51—Precinct 1
Ward 51—Precinct 2

Reference is made to the Memphis Municipal Code as amended and to the Official Ward and Precinct Map of the City of Memphis in the office of the City Comptroller for a description of the wards and precincts hereinabove allocated to the

respective districts One through Seven. Annexed areas shall be assigned as future wards are described. Reference is also made to the minutes of the Quarterly County Court, Shelby County, Tennessee for resolutions establishing precinct lines. A map describing said Districts is filed with the Comptroller of the City of Memphis.

SECTION 2: BE IT FURTHER ORDAINED that this ordinance take effect from and after the date it shall have been passed by the Council, signed by the Chairman of the Council, certified and delivered to the office of the Mayor in writing by the Comptroller and become effective as otherwise provided by law.

Wyeth Chandler
Chairman of City Council

ATTEST:
David R. Hopper
Comptroller

THE FOREGOING ORDINANCE
No. 972 PASSED
1st Reading June 1, 1971
2nd Reading June 8, 1971
3rd Reading June 22, 1971

Approved Wyatt Chandler
Chairman of Council

APPROVED
Henry Loeb
Mayor, City of Memphis

I hereby certify that the foregoing is a true copy, and said document was adopted by the council of the City of Memphis as above indicated and approved by the mayor.

D. R. Hopper
Comptroller